

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM MICHAEL VORVA,

Defendant-Appellant.

UNPUBLISHED

February 2, 1999

No. 195821

Kalamazoo Circuit Court

LC No. 95-000051 FH

Before: Whitbeck, P.J., and McDonald and T. G. Hicks*, JJ.

MEMORANDUM.

Following a jury trial, defendant was convicted of larceny in a building, MCL 750.360; MSA 28.592, and sentenced to five years' probation. Defendant appeals as of right. We affirm.

Defendant argues the trial court abused its discretion in denying his motion for new trial because, according to defendant, the prosecution's key witness lacked credibility. We disagree.

The trial court in this case was permitted to act as a "thirteenth juror" and grant a new trial if it found the testimony of witnesses for the prevailing party not to be credible. *People v Herbert*, 444 Mich 466, 476-477; 511 NW2d 654 (1993).¹ However, the trial court found the prosecution's key witness was credible. After considering defendant's claims and reviewing the record, we find no abuse of discretion. *Id.*

Affirmed.

/s/ William C. Whitbeck

/s/ Gary R. McDonald

/s/ Timothy G. Hicks

¹ In *People v Lemmon*, 456 Mich 625, 636-642, 648; 576 NW2d 129 (1998), the Supreme Court overruled this "thirteenth juror" standard set forth in *Herbert, supra*, but stated that its decision was to be applied prospectively to cases not yet final on the date of its decision. Accordingly, we apply the *Herbert* standard to this case. See *People v Plummer*, 229 Mich App 293, 307, n 3; 581 NW2d

* Circuit judge, sitting on the Court of Appeals by assignment.

753 (1998). However, we note that we would reach the same conclusion under the standard set forth in *Lemmon, supra*.